No. 89-1712 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1989

NORTHWEST FOOD PROCESSORS ASSOCIATION, ET AL.,
PETITIONERS

v.

WILLIAM K. REILLY, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether Section 6(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136d(b), permits the Administrator of the United States Environmental Protection Agency to cancel pesticide registrations based on a settlement agreement with the holders of those registrations without expressly assessing the evidence regarding the risks and benefits associated with continued usage of the pesticide.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A4-A23) is reported at 886 F.2d 1075. The opinion of the district court (Pet. App. A29-A44) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1989. Petitions for rehearing and rehearing en banc were denied on December 8, 1989. Pet. App. A1-A3. By order of Justice O'Connor, the time for filing a petition for a writ of certiorari was extended to March 19, 1990, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

At the time the Administrator entered the order cancelling the registrations at issue, Section 6(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136d(b), provided:

> *Cancellation and change in classification.* — If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of intent either —
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> (1) to cancel its registration or to change its classification together with the reasons (including the factual basis) for his action, or
>
> (2) to hold a hearing to determine whether or not its registration should be cancelled or its classification changed.
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> Such notice shall be sent to the registrant and made public. In determining whether to issue any such notice, the Administrator shall include among those factors to be taken into account the impact of the action proposed in such notice on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy. * * * The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs later, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice. In the event a hearing is held pursuant to such a request or to the Administrator's deter-

mination under paragraph (2), a decision pertaining to registration or classification issued after completion of such a hearing shall be final. In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation and shall fully explain the reasons for these restrictions, and shall include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy, and he shall publish in the Federal Register an analysis of such impact.

STATEMENT

1. Section 3(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides that all pesticides sold or distributed in the United States must be registered by EPA. 7 U.S.C. 136a(a). In relevant part, the statutory standard for registration requires that a pesticide "when used in accordance with widespread and commonly recognized practice * * * will not generally cause unreasonable effects on the environment." Section 3(c)(5)(D) of FIFRA, 7 U.S.C. 136a(c)(5)(D). Under FIFRA, the burden of demonstrating that a pesticide satisfies this statutory standard rests at all times on the registrant or other proponent of continued registration. *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1004, 1012-1018 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977).

Cancellation of a registration may occur automatically or as a result of affirmative action by the Administrator. A registration is cancelled automatically five years after its issuance or at the end of any five-year period thereafter, unless the registrant or "other interested person with the concurrence of the registrant" requests continuance of the registration. Section 6(a)(1) of FIFRA, 7 U.S.C. 136d(a)(1).

In addition, the Administrator may initiate proceedings to cancel a registration if it appears that a pesticide, when used in accordance with widespread or commonly recognized practice, generally causes unreasonable adverse effects on the environment. In such a case, the Administrator issues a notice of intent to cancel the registration under Section 6(b)(1) of FIFRA, 7 U.S.C. 136d(b)(1). The notice is sent to each affected registrant and is published in the Federal Register. The cancellation of an affected product becomes final and effective automatically unless a person "adversely affected" by the notice makes a timely request for a hearing. Section 6(b) of FIFRA, 7 U.S.C. 136d(b).

If a valid request is received, a hearing is conducted by an administrative law judge. Section 6(d) of FIFRA, 7 U.S.C. 136d(d). Where factfinding is necessary for an adjudicatory decision, an evidentiary hearing is held. If, however, "there is no genuine issue of any material fact and * * * the [Agency] is entitled to judgment as a matter of law," or if a party has failed "to state a claim upon which relief may be granted," the ALJ is authorized to enter an accelerated decision. 40 C.F.R. 164.91(a)(6) and (7). Upon the conclusion of the proceedings before the ALJ, whether by entry of an accelerated decision or a decision after the close of an evidentiary hearing, the ALJ issues a determination. This determination, along with the record of the adjudication, is transmitted to the Administrator. The Administrator is responsible for making the final decision regarding cancellation, based on the record of the proceeding. Section 6(d) of FIFRA, 7 U.S.C. 136d(d).

2. On October 7, 1986, the Administrator issued a notice of intent to cancel the registrations of all pesticides containing dinoseb.[1] The cancellation notice was based on

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[1] Dinoseb is a pesticide registered for use as an herbicide, insecticide, fungicide, and desiccant. It has been used for nearly forty years in many

studies indicating that dinoseb could cause health problems in persons exposed to it, including sterility in men and birth defects in the unborn children of pregnant workers. 51 Fed. Reg. 36,650 (1986). The notice affected the registrations for some 300 pesticide products containing dinoseb.[2] Most of the registrations were cancelled by operation of law pursuant to Section 6(b) of FIFRA, 7 U.S.C. 136d(b), because no hearing request was received by the Agency. Six registrants, however, submitted timely hearing requests concerning the cancellation of fewer than 40 dinoseb products. Four of those six registrants subsequently withdrew their hearing requests, resulting in the cancellation of their registrations by operation of law.

The two registrants who had requested hearings, Drexel Chemical Co. and Cedar Chemical Corp. ("the Settling Registrants"), subsequently entered into negotiated settlements with EPA. The Settling Registrants each consented to the cancellation of the registrations for their products. They further agreed not to defend or to assist or acquiesce in the efforts of any other party to secure continued registration of any dinoseb product. See Pet. App. A163. EPA in return agreed to a provision allowing continued usage of dinoseb stocks in existence as of October 7, 1986, under

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regions of the United States on a variety of crops, including peanuts, soybeans, cotton, and potatoes. In the Pacific Northwest, dinoseb is used on several crops, including snap beans, peas, cucurbits, and caneberries. It is used primarily as a herbicide to control broadleaf weeds and as a desiccant on caneberries to suppress growth that could interfere with harvesting.

[2] The Administrator also issued an emergency order suspending the registrations of all pesticide products containing dinoseb. 51 Fed. Reg. 36,650 (1986). This order subsequently was found to be arbitrary and capricious with respect to certain crops in the Pacific Northwest. *Love* v. *Thomas*, 858 F.2d 1347 (9th Cir. 1988), cert. denied, 109 S. Ct. 1932 (1989).

specific protective conditions. See Pet. App. A152-A156; Section 6(a)(1) of FIFRA, 7 U.S.C. 136d(a)(1).[3] The Agency also agreed to specific procedures for indemnification of the producers and the disposal of qualified stocks, pursuant to Sections 15 and 19(a) of FIFRA, 7 U.S.C. 136m, 136q(a). The effectiveness of the settlements was contingent upon entry by the Administrator of an agreed-upon final cancellation order that was attached to each settlement. Pursuant to the agreements, EPA and the Settling Registrants filed joint motions requesting an accelerated decision cancelling the registrations, which an ALJ granted. Pet. App. A159-A160.

The Administrator approved the settlements, and on June 10, 1988, entered the final cancellation order. Pet. App. A150-A158. The accompanying final decision (*id.* at A159-A182) addressed the exceptions filed by the American Frozen Food Institute, a trade association representing frozen food processors and the only petitioner in this Court that was a party to the administrative proceedings. The Institute sought "a full, public cancellation hearing." *Id.* at A160. In rejecting that demand, the Administrator noted that "FIFRA § 6(a)(1) calls for the mandatory cancellation of [pesticide] registrations every five years unless the registrant or 'other interested person with the concurrence of the registrant' requests that the registration be continued in effect." *Id.* at A163-A164. Since "Cedar and Drexel are the sole remaining registrants and they have vowed not to give their concurrence," the Administrator concluded that "further debate over the continued registrability of these dinoseb products is now moot." *Id.* at A164, A165.

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[3] When the Administrator cancels the registration of a pesticide, Section 6(a)(1) of FIFRA authorizes him to permit continued use of stocks of that pesticide existing as of the cancellation date under specific conditions and for specific purposes when such use will not be inconsistent with FIFRA. 7 U.S.C. 136d(a)(1).

The Administrator noted that the Fifth Circuit's holding in *McGill* v. *EPA*, 593 F.2d 631 (1979), supported his decision. In that case, the Administrator observed, the court had stated that "[i]f non-registrants were given hearing rights not contingent on the consent or cooperation of the registrant, any consumer could cause 'a lengthy and expensive hearing purely on its own volition.' " Pet. App. A164-A165 (quoting 593 F.2d at 637). Again following the Fifth Circuit, the Administrator "was unwilling to find 'that Congress intended *sub silentio* to tax the fisc with this kind of expense.' " Pet. App. A165 (quoting 593 F.2d at 637). [4]

3. Petitioners, who represent users of dinoseb products, filed an action in the United States District Court for the District of Oregon challenging the legality of the Administrator's order.[5] Petitioners sought an order enjoining EPA from enforcing the cancellation order with respect to certain crops in the Pacific Northwest. One of the petitioners, the American Frozen Food Institute, also filed a petition for review of the Administrator's order with the United States Court of Appeals for the Ninth Circuit. The district court dismissed the complaint for lack of jurisdiction and, in the alternative, upheld the Administrator's decision. Pet. App. A29-A44.

The court of appeals consolidated petitioners' appeals with the pending petition for review. It first upheld the district court's jurisdictional determination and concluded

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[4] The Administrator's order also permitted limited usage of existing dinoseb stocks under specific circumstances. Pet. App. A151-A157.

[5] The petitioners in this Court – Northwest Food Processors Ass'n, James M. Love, Tualatin Valley Fruit Marketing, Inc., and American Frozen Food Institute – were all plaintiffs in the district court action. Several environmental groups, led by the Northwest Coalition Against Pesticides, intervened in the action to support the Administrator's order regarding cancellation, while asking the court to vacate the provisions dealing with existing stocks.

that the petition for review was the proper vehicle for review of the Administrator's decision. Pet. App. A14. The court then agreed with the Agency that "once both of the remaining dinoseb registrants agreed to the cancellation of their registrations, the Administrator had no obligation to conduct further analyses or proceedings pertaining to cancellation." *Id.* at A18. The court added that "[t]he Fifth Circuit's decision in *McGill* v. EPA * * * directly supports the Administrator's position." *Ibid.*[6]

ARGUMENT

The court of appeals correctly held that the Administrator may cancel pesticide registrations based on settlement agreements between the Agency and the registrants without any further assessment of evidence regarding the risks and benefits of continued usage. This holding does not conflict with any decision of this Court or any other court of appeals, and it presents no question warranting review by this Court.

1. The Administrator reasonably has interpreted FIFRA not to require a full cancellation hearing where all registrants for a particular pesticide have agreed to terminate the registrations for that product. Such an interpretation is consistent with the goals of the statute, avoids the necessity of holding a meaningless adjudicatory hearing, and furthers the policy of encouraging settlements rather than engaging in unnecessary litigation. See *National Coalition Against the Misuse of Pesticides* v. *EPA*, 867 F.2d 636, 642 (D.C. Cir. 1989).

The only other court of appeals that has considered the question presented has reached the same conclusion. As the Administrator and the court below noted, in *McGill* v. *EPA*

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[6] The court of appeals also upheld the existing stocks provisions of the Administrator's order. Pet. App. A19-A23.

the Fifth Circuit held that users of a pesticide could not compel the continuation of a cancellation hearing that was suspended indefinitely after the registrant agreed to accept cancellation of the registrations. The Fifth Circuit recognized that FIFRA gives adversely affected nonregistrants the right to request a cancellation hearing. See 593 F.2d at 635; Section 6(b) of FIFRA, 7 U.S.C. 136d(b).[7] However, the court also recognized that it would make no sense to construe the statute to grant nonregistrants the right to compel a hearing where all of the registrants had agreed to cancellation. 593 F.2d at 637. To conduct or continue a hearing after the only remaining registrants have agreed to cancellation would be wasteful since, regardless of the outcome, the hearing would have no practical effect. Even if the nonregistrants prevailed, the registrants' decision to accept cancellation means that there still would be no product available for sale or distribution.[8]

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[7] The Fifth Circuit noted that the legislative history suggests that nonregistrants were given the right to request a hearing to permit them to contest cancellation in the event that a pesticide producer, while defending certain uses of a product, chose not to defend a relatively minor usage that may be of great importance to a particular agricultural group. The relevant testimony focused on "the DDT case, where the registrant chose to defend the major uses but decided not to undertake the expense of defending the minor uses." *McGill* v. *EPA*, 593 F.2d at 636 (citing *Federal Environmental Pesticide Control Act: Hearings on H.R. 10729 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 92d Cong., 2d Sess. 294 (1972)). Here, in contrast, the registrants have agreed to cease producing the pesticide in question altogether.

[8] While a FIFRA registration authorizes the sale and distribution of the specific pesticide, it does not obligate the registrant to continue such activities. Unlike industries such as railroads or pipelines, it is not necessary for the registrant to obtain permission to stop a licensed activity. See *United Gas Pipe Line Co.* v. *Federal Power Comm'n*, 385 U.S. 83, 88-89 (1966). Absent such a requirement, the registrants cannot be compelled to accept the continuing burden imposed by FIFRA

Given that a hearing cannot accomplish any practical goal once all of the registrants have consented to cancellation, the only logical conclusion is that Congress intended to require nonregistrants to act "with the consent of registrants or with respect to a commodity actually being produced for some purposes." *McGill*, 593 F.2d at 637. That conclusion is supported by the language of Section 6(a)(1), which requires cancellation after five years unless a registrant or an "interested person *with the concurrence of the registrant*" seeks to continue the registration. 7 U.S.C. 136d(a)(1) (emphasis added); see Pet. App. A163-A164. Moreover, any other interpretation would mean that any pesticide user could cause a long and expensive hearing that would be without any practical consequence. In light of the public resources that would be consumed by such a hearing, it would be unreasonable to construe FIFRA to require such a result in the absence of statutory language compelling such a result—as the Fifth Circuit, the court below, and the Administrator have concluded. See Pet. App. A18-A19, A163-A165.

Petitioners attempt to distinguish *McGill* (Pet. 13) by stating that they do not seek a hearing on the question of the appropriateness of the cancellation, but seek only to compel the Administrator to base any order cancelling pesticide registrations on a "competent risk assessment." That is not the relief petitioners sought below, where they asked for a full hearing. See Pet. App. A160. In any event, FIFRA does not provide any method of compiling an evidentiary record for a cancellation order other than through a formal adjudicatory hearing. See Section 6(d), 7 U.S.C. 136d(d); see also 5 U.S.C. 556(e). The participants

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to demonstrate that their product meets the statutory requirements for registration. See *Environmental Defense Fund, Inc.* v. *EPA*, 548 F.2d 998, 1004, 1012 (D.C. Cir. 1976), cert. denied, 431 U.S. 925 (1977).

in such a hearing, including EPA, would insist that all the evidence be tested by the usual adversarial procedures. See 5 U.S.C. 556(d). Therefore, in order for the Administrator to make the new substantive findings sought by petitioners, EPA would have to hold a full hearing on the risks and benefits associated with the continued usage of dinoseb.

Petitioners also suggest (Pet. 16, 28) that an assessment of the sort they demand is required by Section 6(b), 7 U.S.C. 136d(b), which provides that "[i]n taking any final action under this subsection, the Administrator * * * shall include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities * * * and he shall publish in the Federal Register an analysis of such impact." That sentence in Section 6(b) must, we submit, be read together with the preceding sentence, which states that "[*i*]*n the event a hearing is held* * * * a decision pertaining to registration or classification issued after completion of such hearing shall be final" (emphasis added). When the two sentences are read in sequence, it becomes clear that new findings in support of a cancellation order are required only where there has been an evidentiary hearing which serves as the basis for the Administrator's decision. Otherwise, new findings would be required even where no hearing was requested and a registration was cancelled automatically. It was, at the least, reasonable for the Administrator to construe Section 6(b) not to require such a result. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Petitioners do not claim that there is a conflict in the circuits on the question presented. However, they suggest (Pet. 22, 25) that the decision below is in tension with *Consolidated Gas Supply Corp.* v. *Federal Energy Regulatory Comm'n*, 606 F.2d 323, 330 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980). There is no merit to that suggestion.

The settlement proposal at issue in *Consolidated Gas* had never been accepted by the Commission. Thus, the order at issue in that case was based on the evidentiary record, not the settlement proposal. The settlement proposal was important in *Consolidated Gas* only because there was a question whether the Commissioner had improperly used the proposal as evidence to support his final decision. 606 F.2d at 328.

Petitioners also suggest (Pet. 22-24) that the decision below is inconsistent with the decisions of this Court requiring that any order based on a settlement should be in accord with the authorizing statute. See *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984); *System Fed'n No. 91* v. *Wright*, 364 U.S. 642 (1961). That contention adds nothing to their argument on the merits. If, as we contend, and the court below and the Fifth Circuit concluded, FIFRA does not require a hearing where all of the registrants agree to cancellation, then nothing about the settlement conflicts with the decisions of this Court that petitioners cite.

Finally, it is "the unusual case" where all of the registrants "acquiesce in the cancellation of *all* registrations of a pesticide." *McGill*, 593 F.2d at 636. Indeed, the question presented has been considered by the courts of appeals only twice, in 1979 and 1989. Since those courts agreed that the Administrator has reasonably concluded that a hearing is not required in that circumstance, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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